

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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OFFICE OF THE SECRETARY

In the Matter of

Redevelopment of Spectrum to
Encourage Innovation in the
Use of New Telecommunications
Technologies

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ET Docket No. 92-9

RM-7981

RM-8004

To: The Commission

**PETITION FOR
RECONSIDERATION AND PARTIAL CLARIFICATION**

The ASSOCIATION OF AMERICAN RAILROADS ("AAR"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby submits this petition for partial reconsideration and clarification of the Commission's Third Report and Order and Memorandum Opinion and Order ("Third R&O") in ET Docket No. 92-9, released August 13, 1993.¹

AAR applauds the Commission's reaffirmation of the fundamental principle of the 2 GHz transition framework adopted in September 1992 -- that no fixed microwave licensee can be forced to relocate until it is provided comparable alternative facilities and is fully compensated for all relocation costs. However, AAR is concerned about the implementation of this principle and seeks to ensure that the Commission does not create a transition framework for the relocation of fixed microwave

^{1/} This Petition is considered timely pursuant to the Public Notice released September 2, 1993 (58 Fed. Reg. 46547).

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incumbents in the 2 GHz spectrum band that endangers in any way the safety and reliability of the nation's railroads. To this end, AAR urges the Commission to recommend to the National Telecommunications and Information Administration ("NTIA") to include the federal spectrum adjacent to the 2 GHz band in its Spectrum Reallocation Report as required by the Omnibus Budget Reconciliation Act of 1993, in order to facilitate relocation. Further, the Commission should reconsider the use of the "acceptance of applications" as the trigger for the first two-year transition period for fixed microwave incumbents. Finally, all relocating fixed microwave licensees should be eligible for tax certificates to ease the burden of relocation.

I. Use of Government Spectrum

AAR commends the Commission's efforts undertaken with NTIA in attempting to secure adjacent federal spectrum to the 2 GHz band as a possible relocation site for displaced fixed microwave incumbents.² For the reasons set forth below, AAR believes that utilizing adjacent federal spectrum as a relocation site is in the public interest as well as in the interest of fixed microwave incumbents and the new entrants such as personal communications services ("PCS") providers.

The Commission has stated that the rapid deployment of new PCS services will provide the American public with enhanced

^{2/} Third R&O at ¶ 32.

personal access to communications services and enable businesses to realize increases in productivity.³ Clearly, it is in the interest of PCS providers to minimize the expense associated with relocating fixed microwave incumbents from the 2 GHz band so that they may concentrate their resources on deploying new communications technologies in an efficient and innovative manner. In this regard, the costs of relocating fixed microwave licensees to nearby federal government spectrum will be much less than the costs involved in moving them to higher spectrum bands.

For reasons unrelated to cost, railroad users of fixed microwave facilities would prefer to "retune" their existing facilities to operate on nearby government spectrum rather than move their facilities to higher spectrum bands: retuning will minimize the possible disruption to the railroads' critical communications needs. Thus, for a number of reasons -- including reducing costs associated with relocation, speeding the deployment of emerging technology services, and enhancing the prospect of safe and reliable railroad communications -- it is in everyone's interest for federal spectrum adjacent to the 2 GHz band be made available as a relocation site.

AAR believes that NTIA's Spectrum Reallocation Report, as required by the Omnibus Budget Reconciliation Act of 1993, is the ideal vehicle for these interests to converge. By February,

^{3/} First Report and Order and Third Further Notice of Proposed Rule Making, 7 FCC Rcd 6886 (1992) at ¶ 1.

1994, the Budget Act requires NTIA to make available for immediate, non-government use, 50 MHz of spectrum below 5 GHz. AAR believes that the Commission should urge NTIA to make the 50 MHz available in the 1710-1850 MHz band that is adjacent to the 2 GHz band where fixed microwave licensees currently operate. In this manner, fixed microwave incumbents may more easily retune their existing facilities to operate on nearby frequencies rather than undertake expensive, disruptive and time-consuming relocations to higher spectrum bands. AAR believes that such an action is in the best interest of fixed microwave incumbents, PCS providers and the American public.

II. Reconsideration of "Acceptance of Applications"

The Third R&O states that two negotiation periods -- a voluntary two-year period followed a mandatory one-year period -- must expire for before an emerging technology licensee may proceed to request involuntary relocation of a fixed microwave incumbent. The two-year voluntary negotiation period will commence with the "acceptance of applications" for emerging technology services.⁴ AAR believes that using the acceptance of applications as the trigger for the voluntary negotiation period is flawed and should be reconsidered for the following reasons.

The voluntary negotiation period should commence when a

^{4/} Third R&O at ¶ 15.

license is granted -- not when an application is accepted -- to provide PCS in a specific geographic market. Status merely as an applicant for a license, instead of as the holder of the license, will not provide sufficient incentive for a party to negotiate seriously with a fixed microwave incumbent regarding relocation. Furthermore, fixed microwave incumbents are not likely to be interested in entering into serious negotiations with potential PCS providers who have no claim to the spectrum in which they plan to operate.

Once the status of the potential PCS provider is converted from applicant to licensee, however, the PCS licensee will then have a natural and logical incentive to negotiate seriously and in earnest with a fixed microwave licensee in the service area. In furtherance of that incentive, the PCS Order adopted on September 23, 1993, required certain build-out milestones to be met by the PCS licensee, thus ensuring the expeditious deployment of PCS in the 2 GHz band.⁵ Therefore, the issuance of the license, not the acceptance of applications, should trigger the voluntary negotiation period.

III. Reconsideration of Limited Use of Tax Certificates

In the Third R&O, the Commission limited the eligibility for tax certificates to those fixed microwave licensees that complete

^{5/} "New Personal Communications Services Established" Federal Communications Commission News Release (Gen. Docket 90-314), September 23, 1993.

their relocation negotiations during the voluntary, two-year negotiation period.⁶ The Third R&O apparently did not contemplate the issuance of tax certificates to fixed microwave licensees for negotiations completed during the one-year mandatory negotiation period with either licensed or unlicensed PCS providers. AAR believes the Commission should reconsider such a limited use of a valuable public policy tool and clarify the effects of tax certificates in various situations.

The Internal Revenue Service permits the Commission to issue tax certificates to those parties that must sell or exchange property in order to effectuate a new or modified Commission policy.⁷ The issuance of the tax certificate guarantees that the sale or exchange of property will be treated as an involuntary conversion and thus receive favorable treatment under the tax laws.⁸

In light of the fact that all fixed microwave licensees operating in the 2 GHz band reallocated for licensed and unlicensed PCS may be forced to relocate, AAR believes it is appropriate for all such licensees to receive the benefits conferred by the issuance of tax certificates. No matter when the relocation takes place or what band the fixed microwave licensee vacates, the relocation is the direct result of the

^{6/} Third R&O at ¶ 42.

^{7/} 28 U.S.C. § 1071.

^{8/} 28 U.S.C. § 1033.

Commission's adoption of policies necessary to license PCS in the 2 GHz band. Therefore, AAR believes that all fixed microwave licensees should be eligible for tax certificates without regard to when they vacate the 2 GHz band or which particular section of the band they leave.

The Commission in its PCS order, doubled the amount of spectrum reallocated for unlicensed PCS for a total of 40 MHz. As a result, fixed microwave incumbents in the 1890-1930 MHz band only have a one-year mandatory negotiation period in which to conclude relocation agreements with the Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management ("UTAM"). The railroads utilize numerous fixed microwave links in this band alone, which are licensed to at least nine different railroad companies.⁹ In order to facilitate the clearing of such a large number of fixed microwave incumbents in such a short time period, tax certificates should be made available to fixed microwave incumbents who operate in the 40 MHz of spectrum set aside for unlicensed PCS. For the foregoing reasons, the public interest will be advanced by expanding the use of tax certificates beyond that envisioned in the Third R&O.

Finally, AAR believes the Commission should clarify the exact operation of tax certificates in the following situation.

^{9/} As of August, 1992, the following railroads held licenses to operate in the 1910-1930 MHz band: Burlington Northern, Union Pacific, Atchison, Topeka & Santa Fe, Missouri Pacific (2), St. Louis Southwestern Railway, Illinois Central, Grand Trunk Western, Richmond, Fredericksburg & Potomac, and CSX.

If a PCS licensee offers a fixed microwave incumbent a cash payment to cover the expense of relocating the microwave facilities to a higher spectrum band, how will the tax certificate operate if the fixed microwave licensee only uses a portion of the payment to relocate the facilities?

In light of these concerns, AAR believes that the Commission should clarify the precise operation of tax certificates and extend their eligibility to all fixed microwave incumbents forced to relocate.

IV. Conclusion

The transition plan the Commission adopted for the 2 GHz band guarantees that no fixed microwave licensee will be displaced involuntarily from the 2 GHz band until it is provided comparable alternative facilities and full compensation for all relocation expenses. It is in the public interest for federal spectrum adjacent to the 2 GHz band to be made available on a permanent basis for relocating fixed microwave licensees. The issuance of the license, not the acceptance of applications, should trigger the voluntary negotiation period. Finally, all fixed microwave licensees required to relocate should be eligible for tax certificates to minimize any adverse financial impact that might accompany relocation.

WHEREFORE, AAR respectfully requests that the Commission reconsider and clarify the Third R&O as recommended herein.

Respectfully submitted,

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October 4, 1993

CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, a secretary for the law firm Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, do hereby certify that a true and correct copy of the foregoing "Petition for Partial Reconsideration and Clarification" was hand-delivered, this 4th day of October, 1993, to the following:

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